

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

<b>AJD, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases: 02-CA-093895 02-CA-097827</b>
<b>FAITH CORP. OF 42ND STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases: 02-CA-093893 02-CA-098662</b>
<b>18884 FOOD CORP., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases: 02-CA-094224 02-CA-098676</b>
<b>14 EAST 47<sup>TH</sup> STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases: 02-CA-094679 02-CA-098604</b>
<b>JOHN C FOOD CORP., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases: 02-CA-093927 02-CA-098659</b>
<b>840 ATLANTIC AVENUE, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case: 02-CA-097305</b>
<b>1531 FULTON STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases: 02-CA-103771 02-CA-112282</b>
<b>McCONNER STREET HOLDING, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case: 02-CA-098809</b>
<b>McCONNER STREET HOLDING, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case: 02-CA-103384</b>
<b>MIC-EASTCHESTER, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case: 02-CA-103726</b>
<b>BRUCE C. LIMITED PARTNERSHIP, A  McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case: 02-CA-106094</b>

**and**

<b>FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC JO-DAN MADALISSE LTD, LLC d/b/a MCDONALD'S, A FRANCHISEE OF MCDONALD'S USA, LLC and MCDONALD'S USA, LLC Joint Employers</b>	<b>Cases</b>	<b>04-CA-125567 04-CA-129783 04-CA-133621</b>
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**And**

**PENNSYLVANIA WORKERS ORGANIZING COMMITTEE,  
A PROJECT OF THE FAST FOOD WORKERS  
COMMITTEE**

**And**

<b>KARAVITES RESTAURANTS 11102, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS</b>	<b>Case</b>	<b>13-CA-106490</b>
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<b>KARAVITES RESTAURANTS 26, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS</b>	<b>Case</b>	<b>13-CA-106491</b>
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<b>RMC LOOP ENTERPRISES, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case</b>	<b>13-CA-106493</b>
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<b>WRIGHT MANAGEMENT, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT EMPLOYERS</b>	<b>Cases</b>	<b>13-CA-107668 13-CA-113837</b>
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<b>V. OVIEDO, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Cases</b>	<b>13-CA-115647 13-CA-119015 13-CA-123916 13-CA-124813 13-CA-131440</b>
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<b>McDONALD'S RESTAURANTS OF ILLINOIS, INC.</b>	<b>Cases</b>	<b>13-CA-117083 13-CA-118691 13-CA-121759</b>
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<b>LOFTON &amp; LOFTON MANAGEMENT V, INC., A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS</b>	<b>Case</b>	<b>13-CA-118690</b>
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<b>K. MARK ENTERPRISES, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT</b>	<b>Cases</b>	<b>13-CA-123699 13-CA-129771</b>
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**EMPLOYERS**

**NORNAT, INC., A McDONALD'S FRANCHISEE, AND  
McDONALD'S USA, LLC, JOINT EMPLOYERS** Case 13-CA-124213

**KARAVITES RESTAURANT 5895, INC., A McDONALD'S  
FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT  
EMPLOYERS** Case 13-CA-124812

**TAYLOR & MALONE MANAGEMENT, A McDONALD'S  
FRANCHISEE, AND McDONALD'S, USA, LLC, JOINT  
EMPLOYERS** Case 13-CA-129709

**RMC ENTERPRISES, LLC, A McDONALD'S  
FRANCHISEE, AND McDONALD'S USA, LLC, JOINT  
EMPLOYERS** Case 13-CA-131141

**KARAVITES RESTAURANT 6676, LLC, McDONALD'S  
FRANCHISEE, AND McDONALD'S USA, LLC, JOINT  
EMPLOYERS** Case 13-CA-131143

**TOPAZ MANAGEMENT, INC., A McDONALD'S  
FRANCHISEE, AND McDONALD'S USA, LLC, JOINT  
EMPLOYERS** Case 13-CA-131145

**and**

**WORKERS ORGANIZING COMMITTEE OF CHICAGO**

**and**

**MAZT, INC., A McDONALD'S FRANCHISEE, AND  
McDONALD'S USA, LLC, AS JOINT EMPLOYERS** Cases 20-CA-132103  
20-CA-135947  
20-CA-135979  
20-CA-137264

**and**

**WESTERN WORKERS ORGANIZING COMMITTEE OF  
CHICAGO**

**FAITH CORPORATION OF INDIANAPOLIS, A  
McDONALD'S FRANCHISEE, AND McDONALD'S USA,  
LLC, JOINT EMPLOYERS** Cases 25-CA-114819  
25-CA-114915  
25-CA-130734  
25-CA-130746

**and**

**WORKERS ORGANIZING COMMITTEE OF CHICAGO**

**and**

**D. BAILEY MANAGEMENT COMPANY, A  
McDONALD'S FRANCHISEE, AND McDONALD'S  
USA, LLC AS JOINT EMPLOYERS**

**Cases 31-CA-127447  
31-CA-130085  
31-CA-130090  
31-CA-132489  
31-CA-135529  
31-CA-135590**

**2MANGAS INC., A McDONALD'S FRANCHISEE, AND  
McDONALD'S USA, LLC AS JOINT EMPLOYERS**

**Cases 31-CA-129982  
31-CA-134237**

**SANDERS-CLARK & CO., INC, A McDONALD'S  
FRANCHISEE, AND McDONALD'S USA, LLC AS JOINT  
EMPLOYERS**

**Cases 31-CA-128483  
31-CA-129027  
31-CA-133117**

**And**

**LOS ANGELES ORGANIZING COMMITTEE**

### **MOTION TO SEVER**

Faith Corporation of Indianapolis (hereinafter “Faith Corp.”), files this Motion to Sever pursuant to the National Labor Relations Board (hereinafter “Board”) Rules and Regulations, Section 102.33(d) and respectfully requests the Administrative Law Judge (“ALJ”) to order severance of these proceedings such that the cases against Faith Corp. are consolidated with each other but are severed from those cases involving separate independent Franchisees, who are not even alleged to have any joint employment relationship with Faith Corp.

### **BACKGROUND**

Faith Corp. is a Franchisee that independently operated a franchise of McDonald’s USA, LLC (“McDonald’s”) at 1611 N. Meridian Street, Indianapolis until October 28, 2014. In operating the franchise, Faith Corp. was the only employer of the employees working at the restaurant and made all employment decisions concerning the restaurant including employee hiring and termination, employee discipline, and determination of employee schedules. The Workers Organizing Committee of Chicago (“Charging Party”) filed a charge alleging violations of Sections 8(a)(1) and (3) of the National Labor Relations Act. Specifically, the Charging Party alleges that on

or about September 29, 2013, Faith Corp. threatened employees with unspecified reprisals if they engaged in union activities, threatened employees with physical violence if they engaged in union activities, disparaged employees because they engaged in union activities, interrogated employees concerning their union activities, engaged in surveillance of employees' union activities, and intimidated employees because of their union activities. The Charging Party further alleges that on or about September 30, 2013, Faith Corp. threatened employees with legal action if they engaged in union activity, and encouraged employees to transfer to another restaurant because they engaged in union activity. Finally, the Charging Party alleges that on or about May 22, 2014, Faith Corp. reduced the work hours of its employee Cynthia Johnson because she assisted the union and engaged in concerted activities, and to discourage employees from engaging in these activities. Faith Corp. denies that these charges have any merit and looks forward to the opportunity to defend against these allegations.

However, Faith Corp.'s ability to present its case and resolve these claims has been severely prejudiced by the General Counsel's decision to consolidate 61 unfair labor practice charges, across 5 states, involving 21 different independent operators, operating 30 different restaurants.<sup>1</sup> Rather than simply being able to evaluate the merits of the claims against it, and develop a strategy for resolution, Faith Corp. has been dragged into this unmanageable morass involving parties, practices, and factual allegations that are wholly unrelated to the claims against Faith Corp., or even as to the alleged joint employment relationship between Faith Corp. and McDonald's. The only thing that these cases have in common is the "McDonald's" brand name which, in and of itself, does not serve as a basis for consolidation. The General Counsel's decision to consolidate these cases is an extraordinary abuse of discretion given the particularized nature of each case and the high

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<sup>1</sup> On January 5, 2015, the General Counsel transferred cases from Regions 4, 13, 20, 25, and 31 to the Regional Director for Region 2. On January 6, 2015, the Regional Director consolidated the transferred cases for hearing with the consolidated cases in Region 2.

propensity for prejudice to each party's ability to effectively present evidence free of conflation with separate cases and legal issues. The ALJ should sever the consolidated charges such that all charges against Faith Corp. are consolidated with each other but not consolidated with charges involving separate and distinct Franchisees. There simply is no factual connection between the complaints themselves to justify consolidation and as a result, this unprecedented action undermines the purpose of the Act.

#### **I. The Consolidation Violates Board Rule 101.10 On The Location Of Hearings**

The General Counsel's consolidation violates Board Rule 101.10 which provides that "[e]xcept in extraordinary situations the hearing is ...usually conducted in the Region where the charge originated." The General Counsel offers no basis for violating this rule. There are no extraordinary circumstances present to justify hearing cases from six different Regions at various locations around the country.

The General Counsel has proposed hearing Regions 2 and 4 in New York, Regions 13 and 25 in Chicago, and then travelling to Los Angeles for Regions 20 and 31. Despite this phased process, the record will remain open for the duration of the entire trial, thus forcing all parties to participate in this traveling hearing process. This is an incredible expense for the parties involved and is not justified by any prevailing extraordinary situation or interest. Indeed, each Franchisee is facing a series of fairly simple, but factually specific claims which will require individual adjudication. The joint employer issue will require an examination of McDonald's relationship with each Franchisee specific to the claims against it. The consolidation will not provide greater efficiency in hearing these matters, but on the contrary, it will dramatically increase the time and expense of resolution of each of these claims. As such commensurate with Board Rule 101.10, the ALJ should order the severance of this case as to each independent Franchisee and the cases should be heard in their respective Regions.

## **II. Consolidation Of These Factually Distinct Cases Is An Abuse Of Discretion By The General Counsel**

Board Rule § 102.33(a) gives the General Counsel discretion to consolidate cases where “necessary in order to effectuate the purpose of the Act or to avoid unnecessary costs or delay.” This discretion, however, is not unbounded and is subject to review for an abuse of discretion. *See Service Employees Union, Local 87 (Cresleigh Management, Inc.)*, 324 NLRB 774, 774 (1997). Further, Board Rule § 102.35(a)(8) gives the ALJ the authority to “upon motion order proceedings consolidated or severed.” The ALJ should exercise her authority to sever the consolidated cases such that all cases against each independent Franchisee are consolidated with each other but are severed from those cases involving separate Franchisees.

The Board has repeatedly held that consolidation is inappropriate where, as here, the cases involve different units of employees and different factual backgrounds. *See e.g., Accent Maintenance Corporation*, 303 NLRB 294, 299-300 (1991) (denying a motion to consolidate cases where “the events of the Complaint are also distinct and involve separate issues of law and fact.”); *Venture Packaging, Inc.*, 290 NLRB 1237, 1237 n.1 (1988) (denying a motion to consolidate cases where the charging parties and the issues in the cases differed); *c.f. Beverly California Corporation*, 326 NLRB 232, 236 (1998) (involving the “unprecedented” consolidation of 17 cases but where each charge was against one corporation and its wholly-owned subsidiaries). In *United States Postal Service*, 263 NLRB 357, 367 (1982), the Board upheld the ALJ’s denial of a motion to consolidate two cases dealing with different post office branches. The ALJ explained that there was no indication that the charging party in one case had any contact with the respondent or the officials involved in the other case. *Id.*; *see also, The Dow Chemical Company*, 250 NLRB 748, 748 n.1 (1980) (“The motion to consolidate is hereby denied inasmuch as the cases involve different units of employees and raise issues which, in view of the varying allegations of the complaint and different factual backgrounds, are best considered separately.”); *King Broadcasting Company*, 324 NLRB

332, 339 n.12 (1997) (denying a motion for consolidation where the case dealt with “development of subtle and extensive labor-management dynamics”).

Similarly here, the parties involved, the claims, and the disputed practices, all vary amongst Franchisees. The resolution of these claims will require testimony and documents specific to Faith Corp. The employees and supervisors in question do not work for any of the other Franchisee in this consolidated complaint. The events in question are only alleged to have occurred at the restaurant located at 1611 North Meridian Street, Indianapolis, Indiana.

Indeed, each Franchisee in this consolidated complaint is addressing idiosyncratic claims. Even where the joint employer issue is concerned, determining liability for McDonald’s will require individual examination of the company’s relationships, involvement, and level of knowledge relevant to the claims against each Franchisee. It is difficult to imagine a more disparate set of cases and as such, the ALJ should sever cases brought against separate and distinct Franchisees.

### **III. Consolidation Prejudices Each Party’s Ability To Mount A Defense In This Action**

Consolidation of these cases violates due process in that it severely prejudices each Franchisee’s ability to defend against the claims asserted. Courts considering the propriety of consolidation look at whether it “den[ies] a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged in the claims or defenses of others that irreparable injury will result.” *Garber v. Randell*, 477 F.2d 711, 716-717 (2d Cir. 1973); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (“Although consolidation may enhance judicial efficiency, ‘considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.’”). In *Malcolm v. Nat’l Gypsum Co.*, the court reversed the district court’s consolidation of asbestos litigation noting the “dizzying amount of evidence” regarding each victim’s work history, disease pathology, level of exposure, and location of exposure. *See Malcolm*, 995 F.2d 346, 349 (2d Cir. 1993); *see also Garber*, 477 F.2d at 716-717



(finding that consolidating the complaints of various plaintiff stockholders against numerous defendants presented issues of “serious prejudice” explaining that “to be joined with numerous unrelated claims by other purchasers against some 50-odd other defendants in one ‘mixed bag’ type of consolidated complaint would be fundamentally unfair...”).

Here, the disparate issues involved and the sheer number of parties including 21 independent Franchisees, McDonald’s, numerous Charging Parties, and countless witnesses create a due process concern. The presentation of evidence involving 61 unfair labor practice charges and the case-by-case adjudication of McDonald’s as a joint employer, threatens to overwhelm the evidence Faith Corp. will present in its own defense. While Faith Corp. evidence will be specific to Faith Corp., its supervisors, owner, employees, and policies, there is a great potential for confusion and conflation of the factual distinctions with other Franchisees. *See e.g., Arnold v. Eastern Air Lines*, 712 F.2d 899, 906 (4th Cir. 1983) (reversing a decision to consolidate cases and holding that “considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice.”); *see also, Schneck v. IBM*, Case No. 92-4370 (GEB), 1996 U.S. Dist. LEXIS 10126, at \*18 (D.N.J. June 24, 1996) (denying a motion to consolidate explaining that “[t]he critical facts and factual issues are unique to each case, and a consolidation of these individual factual issues would result in inevitable jury confusion and a trial setting highly prejudicial to IBM.”). While Faith Corp. believes the ALJ will work to remain objective throughout the proceedings, it cannot be denied that managing a trial of this magnitude, across the country for what will likely be years, and then issuing rulings in 61 different charges, will be an incredibly challenging task. And where consolidation is not justified by the benefits of added efficiencies, it becomes an entirely unnecessary exercise.

Further, Faith Corp. will be delayed in the resolution of its case by being forced to participate in wholly irrelevant proceedings. “Consolidation that would unnecessarily delay

[another] case is inappropriate.” *Wai Feng Trading Co. v. Quick Fitting, Inc.*, Case No. 13-033S/13-056S, 2014 U.S. Dist. LEXIS 117251, at \*13 (D.R.I. May 30, 2014); *see also Accent Maintenance Corporation*, 303 NLRB at 300 (denying a motion to consolidate explaining that where a case was ripe for decision the parties “are entitled to have their respective rights and obligations determined with reasonable dispatch.”). Rather than simply presenting its defenses and receiving a timely determination on those issues, resolution for Faith Corp. will be delayed for years while the cases against McDonald’s, McDonald’s Restaurants of Illinois, Inc. and each independent Franchisee are litigated around the country. The General Counsel proposes that the same ALJ travel to New York, Chicago, and Los Angeles to preside over these proceedings. All the while, Faith Corp. will be denied resolution on claims large and small, until this process concludes.

Faith Corp. is also prejudiced by the additional time and cost that attending these protracted proceedings will require. The General Counsel’s proposed regional phases of adjudication will still result in an enormous expenditure for Faith Corp. The New York hearings alone will involve all of the consolidated cases in Region 2 and 4 which include 20 charges, 11 independent Franchisees, and adjudication of McDonald’s as a joint employer with each. Faith Corp. must have a presence throughout the proceedings in order to present its defense, point out any relevant distinctions in the operation of its restaurant and its relationship with McDonald’s, and participate in motion practice that may have a bearing on its case. The cost of this process compared to the small proportion of claims at issue specifically relating to Faith Corp., creates a substantial fairness issue.

The General Counsel’s consolidation has also completely stymied settlement discussions. Faith Corp. is being forced to litigate a case involving a run-of-the-mill 8(a)(1) violation because the General Counsel is insistent on trying all joint employer cases together and will not permit Faith Corp. to settle the case absent an admission by Faith Corp. that it is a joint employer with McDonald’s, which it is not. McDonald’s has no authority to remedy the unfair labor practices at

issue even if Faith Corp. is found liable and the allegations don't involve any McDonald's employees or facilities that McDonald's operates. The joint employer issue is of such importance to Faith Corp. and the viability of the franchise business model generally, that a required concession on this point effectively takes settlement off the table. Moreover, not only is Faith Corp. being forced to litigate a case it would likely settle with a notice posting with little cost or delay to all parties in the absence of the General Counsel's joint-employer admission requirement, but Faith Corp. is now being forced into a massive, complex trial involving dozens of unrelated corporate entities that will take years to resolve, the likes of which are unprecedented in any forum.

#### **IV. Continued Consolidation Will Result In An Unmanageable Hearing Process Rife With Numerous Delays**

The General Counsel's decision to consolidate should be guided by concerns for "effectuat[ing] the purposes of the Act or avoid[ing] unnecessary costs or delay." Board Rule § 102.33(a). Here, there are no common issues of fact that would achieve the efficiencies of consolidation. Severance of the cases against each distinct Franchisee to allow them to proceed separately will increase efficiency and avoid additional costs to the parties of participating in the litigation of wholly irrelevant issues. This type of consolidation, particularly where the cases do not involve a common set of facts or parties, will be completely unmanageable. At every stage of the hearing process, the consolidated cases will be susceptible to delay.<sup>2</sup>

The numerous parties involved will include counsel for each Franchisee, counsel for McDonald's, counsel for the General Counsel, and counsel for each of the Charging Parties. As stated previously, each of these parties will need to be present and participate at each stage of the

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<sup>2</sup> *CNN America, Inc.*, Case Nos. 05-CA-31828 and 05-CA-33125, primarily involved whether CNN and its former subcontractor were joint employers under the Act. While this case concerned only two corporate entities and two unfair labor practice charges, it took 82 days to try and involved "16,000 pages of transcript and over 1300 exhibits." *CNN America, Inc.*, Case Nos. 05-CA-31828 and 05-CA-33125, 2008 WL 6524258, at \*1 (N.L.R.B. Div. of Judges Nov. 19, 2008). This case was pending before the Board for over five years before the Board finally issued a decision on September 15, 2014. See 361 NLRB No. 47. By comparison, given the size of this case as currently consolidated, it is likely to take much longer than *CNN America, Inc.* to conclude.

consolidated proceedings in order to properly track the progress of the case and protect their interests throughout the hearing. Trial preparation will involve the exchange of likely millions of documents between the parties. The inevitable disputes over discovery will, no doubt, result in numerous delays to the overall proceedings.

Witnesses will need to be prepped to endure direct examination but also multiple rounds of cross examination as each involved party will be entitled to question each witness. Further, given the numerous parties involved, any motion practice during the proceedings will also result in delays as the ALJ will be reviewing motions from each party involved, in making her rulings.

Finally, the post-hearing brief submissions of each party will delay final resolution of the various cases. Given the involvement of counsel for each Franchisee, counsel for McDonald's, counsel for the General Counsel, and counsel for each of the Charging Parties, there is the potential for more than 20 post-hearing briefs at the end of the proceedings. Severance of the cases such that all charges against a single Franchisee are consolidated with each other but not consolidated with charges involving separate and distinct Franchisees will decrease each of these inefficiencies and minimize the potential for delay to all of the parties.

### **CONCLUSION**

For the foregoing reasons, Faith Corp. respectfully requests the ALJ to order the severance of cases against each distinct Franchisee.

Dated: January 21, 2015

Respectfully submitted,

*/s/ Andrew W. Gruber*

Andrew W. Gruber

BINGHAM GREENEBAUM DOLL LLP

10 West Market Street, Suite 2700

Indianapolis, IN 46204

317.968.5381

317.236.9907 (facsimile)

[agruber@bgdlegal.com](mailto:agruber@bgdlegal.com)

## **CERTIFICATE OF SERVICE**

The undersigned, an attorney admitted to practice before the Courts of the State of Indiana, affirms under penalty of perjury, that, on January 21, 2015, he caused a true and correct copy of Faith Corporation of Indianapolis' Motion to Sever to be served upon counsel for the Charging Parties by e-mail and first-class mail in a postage-prepaid, properly addressed envelope at the following addresses designated by each attorney for this purpose, respectively:

Willis J. Goldsmith  
Doreen S. Davis  
Matthew W. Lampe  
Joshua M. Grossman  
Sharon S. Cohen  
JONES DAY  
222 East 41st Street  
New York, NY 10017  
Tel: 212.326.3939  
Fax: 212.755.7306  
[wgoldsmith@jonesday.com](mailto:wgoldsmith@jonesday.com)  
[ddavis@jonesday.com](mailto:ddavis@jonesday.com)  
[mwlampe@jonesday.com](mailto:mwlampe@jonesday.com)  
[jgrossman@jonesday.com](mailto:jgrossman@jonesday.com)  
[sharoncohen@jonesday.com](mailto:sharoncohen@jonesday.com)

Gwynne Wilcox  
Micah Wissinger  
Michael Hickson  
Vanessa Flores  
LEVY RATNER, P.C.  
80 Eighth Avenue, 8<sup>th</sup> Floor  
New York, NY 10011  
[gwilcox@levyratner.com](mailto:gwilcox@levyratner.com)  
[mwissinger@levyratner.com](mailto:mwissinger@levyratner.com)  
[mhickson@levyratner.com](mailto:mhickson@levyratner.com)  
[vflores@levyratner.com](mailto:vflores@levyratner.com)

Robert Brody  
Abby Warren  
BRODY & ASSOCIATES  
30 Wall Street, 8<sup>th</sup> Floor  
New York, NY 10005  
[rbrody@brodyandassociates.com](mailto:rbrody@brodyandassociates.com)  
[awarren@brodyandassociates.com](mailto:awarren@brodyandassociates.com)

Fast Food Workers Committee  
2-4 Nevins St., Second Floor  
Brooklyn, NY 11217

Jonathan M. Linas  
Michael S. Ferrell  
Andrew G. Madsen  
JONES DAY  
77 West Wacker Drive  
Chicago, IL 60601  
Tel: 312.269.4245  
Fax: 312.782.8585  
[jlinas@jonesday.com](mailto:jlinas@jonesday.com)  
[mferrell@jonesday.com](mailto:mferrell@jonesday.com)  
[amadsen@jonesday.com](mailto:amadsen@jonesday.com)

Geoffrey Dunham  
Leah Z. Jaffe  
NATIONAL LABOR RELATIONS BOARD, REGION 02  
26 Federal Plaza, Suite 3614  
New York, NY 10278-3699  
[geoffrey.dunham@nrlb.gov](mailto:geoffrey.dunham@nrlb.gov)  
[leah.jaffe@nrlb.gov](mailto:leah.jaffe@nrlb.gov)

Karen Fernbach, Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 02  
26 Federal Plaza, Suite 3614  
New York, NY 10278-3699  
[karen.fernbach@nrlb.gov](mailto:karen.fernbach@nrlb.gov)

Mary Carlson  
1100 New York Avenue, Suite 500 West, NW  
Washington, DC 20005

Judith A. Scott, General Counsel  
SERVICE EMPLOYEES INTERNATIONAL UNION  
1800 Massachusetts Avenue, NW  
Washington, DC 20036-1806  
[judy.scott@seiu.org](mailto:judy.scott@seiu.org)

Michael J. Healey  
HEALEY & HORNACK, P.C.  
247 Fort Pitt Blvd., 4<sup>th</sup> Floor  
Pittsburgh, PA 15222  
[mike@unionlawyers.net](mailto:mike@unionlawyers.net)

Dennis P. Walsh, Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 04  
615 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19106-4404  
[dennis.walsh@nrlb.gov](mailto:dennis.walsh@nrlb.gov)

Steve A. Miller  
James M. Hux, Jr.  
Craig R. Annunziata  
FISHER & PHILLIPS LLP  
10 S. Wacker Drive, Suite 3450  
Chicago, IL 60606-7592  
[smiller@laborlawyers.com](mailto:smiller@laborlawyers.com)  
[jhux@laborlawyers.com](mailto:jhux@laborlawyers.com)  
[cannunziata@laborlawyers.com](mailto:cannunziata@laborlawyers.com)

Barry M. Bennett  
George A. Luscombe, III  
DOWD, BLOCH, BENNETT & CERVONE  
8 S. Michigan Ave., Floor 19  
Chicago, IL 60603-3315  
[bbennett@dbb-law.com](mailto:bbennett@dbb-law.com)  
[gluscombe@dbb-law.com](mailto:gluscombe@dbb-law.com)

Matthew Egan  
David J. Stein  
PRETZEL & STOUFFER  
One South Wacker Drive, Suite 2500  
Chicago, IL 60606-4708  
[megan@pretzel-stouffer.com](mailto:megan@pretzel-stouffer.com)  
[dstein@pretzel-stouffer.com](mailto:dstein@pretzel-stouffer.com)

Jeffrey A. Macey  
MACEY SWANSON AND ALLMAN  
445 N. Pennsylvania St., Ste. 401  
Indianapolis, IN 46204-1893  
[jmacey@maceylaw.com](mailto:jmacey@maceylaw.com)

Pennsylvania Workers Organizing Committee  
846 N. Broad Street  
Philadelphia, PA 19130

Ceilidh Gao, Law Fellow  
SERVICE EMPLOYEES INTERNATIONAL UNION  
1800 Massachusetts Avenue, NW  
Washington, DC 20036-1806  
[ceilidh.gao@seiu.org](mailto:ceilidh.gao@seiu.org)

Joseph A. Hirsch  
HIRSCH & HIRSCH  
One Belmont Avenue  
8<sup>th</sup> Floor, Suite 8001  
Bala Cynwyd, PA 19004  
[jahirsch@hirschfirm.com](mailto:jahirsch@hirschfirm.com)

Gina M. LiVolsi  
Brian J. Sharpe  
Caralyn M. Olie  
Susan M. Troester  
Terrill Pierce  
LAPOINTE LAW, P.C.  
1200 Shermer Road, Suite 310  
Northbrook, IL 60062-4500  
[glivolsi@lapointelaw.net](mailto:glivolsi@lapointelaw.net)  
[bsharpe@lapointelaw.net](mailto:bsharpe@lapointelaw.net)  
[colie@lapointelaw.net](mailto:colie@lapointelaw.net)  
[stroester@lapointelaw.net](mailto:stroester@lapointelaw.net)  
[tpierce@lapointelaw.net](mailto:tpierce@lapointelaw.net)

Peter Sung Ohr, Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 13  
209 South La Salle Street, Suite 900  
Chicago, IL 60604-1443  
[peter.ohr@nrlb.gov](mailto:peter.ohr@nrlb.gov)

Christopher Busey  
Amanda A. Sonneborn  
SEYFARTH SHAW LLP  
131 S. Dearborn St., Suite 2400  
Chicago, IL 60603-5577  
[cbusey@seyfarth.com](mailto:cbusey@seyfarth.com)  
[asonneborn@seyfarth.com](mailto:asonneborn@seyfarth.com)

Workers Organizing Committee of Chicago  
123 W. Madison St., Ste. 800  
Chicago, IL 60602-4621

Rik Lineback, Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 25  
575 N Pennsylvania St. Ste 238  
Indianapolis, IN 46205-1520  
[rik.lineback@nlrb.gov](mailto:rik.lineback@nlrb.gov)

Thomas O'Connell  
BEST, BEST & KRIEGER  
3390 University Avenue, 5<sup>th</sup> Floor  
Riverside, CA 92501  
[thomas.oconnell@bbklaw.com](mailto:thomas.oconnell@bbklaw.com)

Sean Graham  
WEINBERG ROGER & ROSENFELD  
800 Wilshire Boulevard, Suite 1320  
Los Angeles, CA 90017-2623  
[sgraham@unioncounsel.net](mailto:sgraham@unioncounsel.net)

Jonathan Cohen  
Eli Naduris-Weissman  
ROTHNER, SEGALL & GREENSTONE  
510 South Marengo Avenue  
Pasadena, CA 91101-3115  
[jcohen@rsglabor.com](mailto:jcohen@rsglabor.com)  
[enaduris-weissman@rsglabor.com](mailto:enaduris-weissman@rsglabor.com)

Mori Rubin, Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 31  
11500 W. Olympic Boulevard, Suite 600  
Los Angeles, CA 90064  
[mori.rubin@nlrb.gov](mailto:mori.rubin@nlrb.gov)

Roger Crawford  
BEST, BEST & KRIEGER  
2855 E. Guasti Road, Suite 400  
Ontario, CA 91761  
[roger.crawford@bbklaw.com](mailto:roger.crawford@bbklaw.com)

Joseph F. Frankl, Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 20  
901 Market Street, Suite 400  
San Francisco, CA 94103  
[joseph.frankl@nlrb.gov](mailto:joseph.frankl@nlrb.gov)

Alfred De La Cruz  
Vi Applen  
MANNING & KASS, ELROD, RAMIREZ, TRESTER LLP  
801 S. Figueroa St., Floor 15  
Los Angeles, CA 90017-5504  
[amd@manningllp.com](mailto:amd@manningllp.com)  
[vna@manningllp.com](mailto:vna@manningllp.com)

Brian D. Gee, Acting Regional Director  
NATIONAL LABOR RELATIONS BOARD, REGION 31  
11500 W. Olympic Boulevard, Suite 600  
Los Angeles, CA 90064  
[brian.gee@nlrb.gov](mailto:brian.gee@nlrb.gov)

/s/ Andrew W. Gruber